

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LATEE ROBINSON

Plaintiff,

v.

DECISION AND ORDER
10-CV-326

VISCUSO, Prison Guard, et al.,

Defendants.

This civil rights case was referred to Magistrate Judge H. Kenneth Schroeder, Jr. for supervision of all pretrial proceedings. Plaintiff, proceeding *pro se*, alleges various causes of action pursuant to 42 U.S.C. §1983 ("Section 1983") including excessive force, denial of adequate medical care, and denial of nutritionally adequate food all in violation of the Eighth Amendment.¹ Defendants have filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Dkt. No. 21)

On July 15, 2013, Magistrate Judge Schroeder issued a Report, Recommendation and Order recommending that defendants' motion for summary

¹ Plaintiff's initial complaint asserted 18 separate causes of action against over seventy New York State Department of Corrections and Community Supervision ("DOCCS") employees based upon incidents occurring at various jails from July 2006 through January 2010. On August 16, 2010, this Court issued a Decision and Order severing 12 of plaintiff's claims and transferring them to the Southern and Northern Districts of New York and dismissing with prejudice three causes of action for failure to state a claim upon which relief may be granted. Thus, only plaintiff's remaining viable claims are discussed herein.

judgment be granted in part and denied in part. (Dkt. No. 45) Specifically, Magistrate Judge Schroeder recommended the following: (1) that defendant's motion for summary judgment be granted with respect to plaintiff's claim alleging excessive force and denial of adequate medical treatment based upon the incident at Five Points Correctional Facility on April 19, 2009; (2) that defendant's motion for summary judgment be granted with respect to plaintiff's claim alleging denial of adequate medical treatment based upon the incident at Five Points Correctional Facility on April 20, 2009; (3) that defendant's motion for summary judgment be denied to the extent it seeks to dismiss the Eighth Amendment claim against defendants Hill and Hibsich based upon their alleged use of excessive force on April 20, 2009; (4) that defendants' motion for summary judgment be granted to the extent it seeks dismissal of the excessive force claims against defendants Bascom, Matice, Gould and Brown based upon the incident on April 20, 2009, due to the lack of evidence indicating that they were personally involved in the events related to this claim; and (5) that defendants' motion for summary judgment be granted to the extent it seeks dismissal of plaintiff's claim that he was denied nutritionally adequate food, based upon plaintiff's failure to exhaust administrative remedies.

Plaintiff filed objections to the Report, Recommendation and Order on July 29, 2013. (Dkt. No. 46) Defendants filed a response on September 20, 2013.

(Dkt. No. 49) ² The Court deemed the matter submitted without oral argument.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon *de novo* review, and after reviewing the submissions from the parties, the Court hereby adopts Magistrate Judge Schroeder's Report and Recommendation granting in part and denying in part defendants' motion for summary judgment.³

Accordingly, for the reasons set forth in Magistrate Judge Schroeder's Report, Recommendation and Order, summary judgment is granted in part and denied in part. Defendants' motion is denied to the extent it seeks dismissal of Plaintiff's excessive force claims against defendants Hill and Hibschi based upon the April 20, 2009 incident. Defendants' motion for summary judgment is otherwise granted in all respects.

The matter is referred back to Magistrate Judge Schroeder for a determination as to whether the parties are interested in engaging in settlement negotiations or would consent to a trial before the Magistrate Judge.

² Defendants do not object to the Magistrate Judge's recommendation to deny summary judgment as to plaintiff's excessive force claim with respect to defendants Hill and Hibschi based upon the April 20, 2009 incident.

³To accept the report and recommendation of a magistrate, to which no objection has been made, a district court need only satisfy itself that there is "no clear error on the face of the record." *Torres v. New York*, 976 F. Supp. 249 (SDNY 1997). The Court also fully adopts the Magistrate's findings to which no objections have been made.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: September 30, 2013